Supreme Court, U.S.
FILED
MAR 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1163

In the Supreme Court of the United States

OCTOBER TERM, 1986

VERA ROGERS JONES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

PATRICIA L. WEISS
DAVID C. SHILTON
M. ALICE THURSTON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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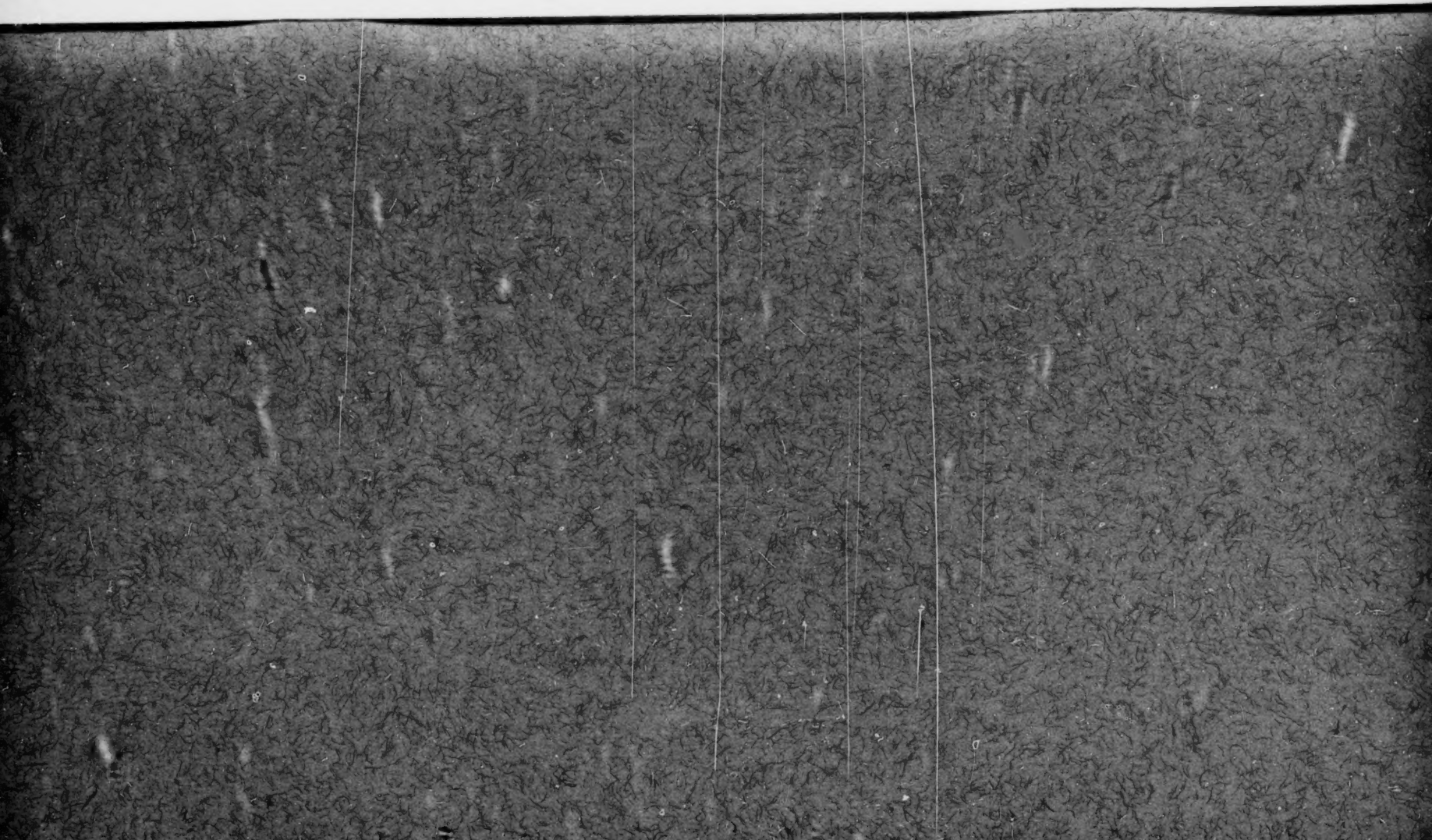

QUESTION PRESENTED

Whether this damage action against the United States, which was filed in 1984 and is based on an alleged breach of fiduciary duty and an uncompensated taking resulting from an unauthorized county tax sale of Indian trust property in 1937, is barred by the six-year statute of limitations in 28 U.S.C. 2501.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is reported at 801 F.2d 1334. The opinion of the Claims Court (Pet. App. 7-16) is reported at 9 Cl. Ct. 292.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1986, and a petition for rehearing was denied on October 21, 1986 (Pet. App. 18). The petition for a writ of certiorari was filed on

January 15, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are the owners of certain property (known as "Lot 1") in Nez Perce County, Idaho. The property was purchased by the United States in 1912 for Hattie Davis Rogers and was taken into trust pursuant to the General Allotment Act of 1887, ch. 119, 24 Stat. 388 *et seq.*[1] Shortly thereafter, the County attempted to levy taxes on the property, but it was enjoined from so doing in a suit brought by the United States. *United States* v. *Nez Perce County*, 267 F. 495 (D. Idaho 1917); C.A. App. 27-28. In 1923, the County again assessed taxes against the property.[2] The taxes were not paid, and the County sold the property at a tax sale in 1937 to Forrest L. Lisher. Pet. App. 2, 8; C.A. App. 8.

2. In July of 1972, Vera Rogers Brooks and Ada Rogers Graham, successors in beneficial interest to Hattie Davis Rogers, filed suit in the United States District Court for the District of Idaho against Nez Perce County and the successors in interest to Forrest Lisher, seeking return of the property. The United States was not named as a defendant, and the suit was dismissed in 1975 for lack of federal jurisdiction. See *Brooks* v. *Nez Perce County*, 394 F. Supp. 869, 871 (D. Idaho 1975).

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[1] Petitioners are Vera Rogers Jones and the estates of Ada Rogers Graham and Hattie Davis Rogers.

[2] Petitioners alleged in their complaint in the instant case that the United States had erroneously concluded in 1922 that its trust responsibility with respect to the allotment had ceased and "may have informed Nez Perce County that the trust over Hattie Davis' allotment had expired" (C.A. App. 7).

The plaintiffs refiled their suit in district court in 1977, adding as defendants the United States, the Secretary of the Interior, and the Commissioner of Indian Affairs. See Second Amended Complaint, *Brooks, et al.* v. *Nez Perce County, Idaho, et al.*, No. 2-72-27 (D. Idaho, filed July 21, 1977) (C.A. App. 35-43). Later in 1977, petitioners and the United States stipulated to the realignment of the United States as a plaintiff in the *Brooks* case (C.A. App. 8). The district court granted partial summary judgment in favor of the United States on October 15, 1979, quieting title to the property in the United States as trustee and exempting the land from taxation (C.A. App. 54). However, in a separate ruling dated May 13, 1980, the district court held that it would be inequitable to award damages (in the form of mesne profits) against Nez Perce County (C.A. App. 58-62), because those damages "were increased by [the United States' and petitioners'] own inaction" (C.A. App. 60).

The United States Court of Appeals for the Ninth Circuit reversed the district court's holding that the United States was completely barred from recovering damages on petitioners' behalf, but it stated that the "[l]ack of diligence by the government in exercising its role as trustee [could be weighed] in calculating damages." *Brooks* v. *Nez Perce County, Idaho*, 670 F.2d 835, 837 (9th Cir. 1982). On remand, the district court found that the present value of the income lost between 1937 and 1979 was $216,000, and it concluded that this amount should be reduced by approximately 50% because of the delay in recovering the property. The court therefore awarded petitioners $108,000 in damages. *Brooks* v. *Nez Perce County*, No. 2-72-27 (D. Idaho Mar. 3, 1983) (C.A.

App. 66-70); Pet. App. 2-3, C.A. App. 9. Neither petitioners nor the United States took an appeal from the district court's decision.

3.a. On November 15, 1984, petitioners filed the instant action in the United States Claims Court seeking a money judgment against the United States in the amount by which the district court reduced the damage award in *Brooks*. Petitioners alleged that Lot 1 had been taken for a public use without just compensation (C.A. App. 9-10) and that the United States had breached its fiduciary duties as a result of its failure to: "(1) enforce the 1918 decree enjoining the taxation of the property; (2) block Hattie Davis Rogers' eviction [in 1927]; (3) prevent the tax sale [in 1937]; and (4) seek return of the property once it was sold" (Pet. App. 11).

The Claims Court granted the United States' motion to dismiss, holding that this suit is barred by the six-year statute of limitations in 28 U.S.C. 2501 (Pet. App. 7-16). The Claims Court noted that the first three breaches of trust alleged by petitioners occurred long before the suit was brought. By contrast, the court believed that the last alleged violation—the United States' failure to seek return of the property—was a continuing breach of trust. However, in the court's view, this continuing breach terminated in 1977, when the United States was realigned as a plaintiff in the *Brooks* litigation and joined with petitioners in seeking return of the property. Because that realignment also occurred more than six years before the instant suit was filed, the court held that that claim too is barred by 28 U.S.C. 2501. The court rejected petitioners' contention that petitioners could not have filed suit in 1977 because they did not know at that time the amount of dam-

ages (if any) that they would recover from Nez Perce County. The court explained that the fact that petitioners "may not have fully appreciated the legal consequences flowing from defendant's nonfeasance—including the possibility that they might be entitled to money damages—does not toll the statute of limitations" (Pet. App. 12 (citations omitted)).

b. The United States Court of Appeals for the Federal Circuit affirmed (Pet. App. 1-6). The court reasoned that the statute of limitations, by its terms, begins to run when a claim "accrues" (28 U.S.C. 2501) and that an "action for breach of fiduciary duty accrues when the trust beneficiary knew or should have known of the breach" (Pet. App. 4). Here, the court explained, under any of petitioners' theories, they knew of the breach of fiduciary duty at least six years before this suit was filed (*ibid.*). The court specifically rejected petitioners' argument that the statute of limitations never began to run on their breach of fiduciary duty claim because the United States had not repudiated the trust. In the court's view, the trust was repudiated "by actions inconsistent with [the government's] obligations under the trust," and the running of the statute of limitations thus was triggered by those actions (*id.* at 4-5). The court of appeals also found that the alleged taking of property occurred more than six years prior to the commencement of this action and that petitioners' taking claim therefore is also barred (*ibid*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Petitioners simply challenge the court of appeals' application of the six-year statute of limitations to the particular circumstances of this case. This challenge raises no issue of general importance warranting review by this Court.

1. Petitioners have not stated a proper claim against the United States for a "taking" of property, and their taking claim is time-barred in any event.

a. The United States in this case engaged in no taking of property within the meaning of the Fifth Amendment. "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time." *United States* v. *Dickinson*, 331 U.S. 745, 748 (1947). See also *Pete* v. *United States*, 531 F.2d 1018, 1031 (Ct. Cl. 1976). Here, however, the United States neither acquired the property for its own benefit (compare *United States* v. *Mottaz*, No. 85-546 (June 11, 1986)) nor imposed restrictions on the use and enjoyment of it by petitioners and their predecessors in interest (compare *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 4-7). Rather, the United States acquiesced in action by others—officials of Nez Perce County—who first taxed the property and then later sold it to third parties. The mere failure by officials of the United States to take action to prevent or undo the actions of a county government is not a "taking" of property by the United States that would trigger an obligation on the part of the United States under the Fifth Amendment to pay compensation.

Furthermore, petitioners contend that the inaction of United States officials with respect to the property was unlawful under 25 U.S.C. 348, which required the United States to hold the property in trust. It is well settled, however, that unlawful or unauthorized conduct by governmental officials does not constitute a taking of property by the United States within the meaning of the Fifth Amendment. See, *e.g.*, *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1017 (1984); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 127 n.16 (1974); *Yearsley* v. *Ross Construction Co.*, 309 U.S. 18, 21 (1940); *Hooe* v. *United States*, 218 U.S. 322, 336 (1910). Accordingly, the alleged violation by the responsible governmental officials of their statutory duties with respect to the property at issue in this case does not give rise to a claim under the Tucker Act to obtain the compensation that would be owed for a statutorily authorized "taking" of property.

b. Even if petitioners had stated a proper taking claim, their claim would be barred by the statute of limitations in 28 U.S.C. 2501. Under that statute, a claim must be brought within six years of the date on which it "first accrues." If we assume arguendo that the unlawful tax sale of the property by Nez Perce County constituted a taking by the United States, petitioners' taking claim accrued on the date of that sale, in 1937. See *Soriano* v. *United States*, 352 U.S. 270, 277 (1957); *United States* v. *Dow*, 357 U.S. 17 (1958). The phrase "*first* accrues" in fact underscores that the six-year period begins to run from the date on which the plaintiff first has a right to sue (*Soriano*, 352 U.S. at 275). In this case, there was nothing to prevent petitioners' predecessor in interest, Hattie Davis Rogers, from bringing an

action immediately after the tax sale, either against the County and the purchaser to have the tax sale set aside or against the United States alleging a taking of her property.

Petitioners nevertheless contend that the statute of limitations did not begin to run until "the United States first took an unequivocal position as to Lot 1 and took the action on that position [in the *Brooks* litigation] that resulted in the return of Lot 1 in 1979"; prior to that time, petitioners argue, "the government's failure to take a firm stand created uncertainty" (Pet. 10). However, this suit would be time-barred even under petitioners' novel view of the statute of limitations, because it was when the United States was realigned as a plaintiff in the *Brooks* litigation that it took a firm position that the 1937 tax sale was void and that petitioners retained title to Lot 1. The realignment, to which petitioners stipulated, took place in 1977, more than six years before this suit was filed in November 1984.

Moreover, any taking of property that resulted from the tax sale of the property by the County was completely accomplished by the seemingly absolute and permanent divestment of Hattie Davis Rogers' title. There accordingly was no "uncertainty" about the sale that would have prevented petitioners from suing the United States (or the County and the purchaser) in 1937. If anything, the United States' realignment as a plaintiff in the *Brooks* litigation *created* uncertainty about the validity of the tax sale. In any event, in *United States* v. *Kubrick*, 444 U.S. 111, 118-125 (1979), the Court rejected the notion that the running of the statute of limitations is tolled simply because the plaintiff might be uncertain or unaware of the legal basis of his claim.

Petitioners attempt to avoid this result by arguing that the taking resulting from the tax sale was only "temporary" and that their claim did not accrue until the district court quieted title in the United States in 1979, because it was not until then that "the extent and duration of the taking [were] fixed" (Pet. 9). This argument is without merit. Rogers' loss of the property in 1937 was not "temporary." The tax sale obviously was intended to accomplish a complete and permanent divestment of Rogers' title. Accordingly, the extent and duration of the alleged taking were fixed in 1937. Any taking claim against the United States became forever time-barred six years later. The taking claim was not revived by the United States' agreement with petitioners in 1977 that the 1937 sale was void.

The foregoing discussion demonstrates why petitioners' reliance on *United States* v. *Dickinson*, 331 U.S. 745 (1947), is misplaced. *Dickinson* involved a taking claim based on the flooding of property that was caused by the construction of a dam. The question was whether the property was taken when the dam was built, when the lands were first flooded, or when the lands were permanently flooded. *Id.* at 746-747. The Court found that "the source of the entire claim—the overflow due to rises in the level of the river—was not a single event; it was continuous. And as there is nothing in reason, so there is nothing in legal doctrine, to preclude the law from meeting such a process by postponing suit until the situation becomes stabilized." *Id.* at 749. In this case, the situation giving rise to a cause of action became "stabilized" not when damages were awarded in *Brooks*, but at the time of the tax sale in 1937. At that point, no additional events were necessary to es-

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tablish an invasion—indeed, a divestiture—of Rogers' rights. Even if the *Brooks* litigation had been commenced immediately after the tax sale, that on-going litigation would not have had "the quality of continuing events that *Dickinson* contemplated in its holding that the cause does not accrue 'until the situation becomes stabilized.'" *Alder* v. *United States*, 785 F.2d 1004, 1008 (Fed. Cir. 1986), cert. denied, No. 85-1938 (Oct. 6, 1986), quoting *Dickinson*, 331 U.S. at 749. A fortiori, petitioners cannot rely on the allegedly "destabilizing" effect of parallel litigation in view of the failure by petitioners or their predecessors in interest to file the *Brooks* suit until 35 years later.[3]

2. Petitioners' claim based on an alleged breach of fiduciary duty also is time-barred.[4]

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[3] Neither *Castro* v. *United States*, 500 F.2d 436 (Ct. Cl. 1974), nor *Oro Fina Consolidated Mines, Inc.* v. *United States*, 92 F. Supp. 1016 (Ct. Cl. 1950), cert. denied, 341 U.S. 948 (1951), upon which petitioners rely (Pet. 11), supports their position. In those cases, the duration and extent of the taking were uncertain and were tied to a non-judicial determination by Executive officials, and the dispossessed owners were without judicial recourse to terminate the "taking" and bring about an ascertainment and award of compensation. Here, by contrast, petitioners did not have to wait until 1972 to bring suit to recover the property or until 1984 to sue the United States to recover a money judgment, and the extent and duration of dispossession were in no way tied to the award of damages in *Brooks*. In any event, any inconsistency between the decision by the Federal Circuit in the instant case and the decisions by the Federal Circuit's predecessor, the Court of Claims, in *Castro* and *Oro Fina* is merely an intracircuit conflict that does not warrant review by this Court.

[4] Contrary to the Claims Court's apparent view, the fact that the tax sale was found in the *Brooks* litigation to have violated the restraints on alienation imposed by the General Allotment

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a. As an initial matter, petitioners err in asserting (Pet. 12-13) that completion of the *Brooks* litigation was a condition precedent to this suit. Even in the absence of that litigation, petitioners would have been entitled to assert in a Tucker Act suit against the United States: (1) that Rogers held title to the land; (2) that the United States had a statutory duty to seek return of the land; and (3) that petitioners had a claim of title sufficient to impose a duty on the United States to assert that title on their behalf. No litigation against third parties in district court was necessary in order for petitioners to make those assertions. Compare *United States* v. *Mason*, 412 U.S. 391 (1973). But even if such litigation were necessary, petitioners or their predecessors in interest could have filed the instant suit against the United States on a protective basis, and thereby put the United States on notice of their claim, on or before the date on which they filed the *Brooks* case.[5]

Act does not necessarily establish an actionable breach of fiduciary responsibility by the United States. A trustee, including the United States in its capacity as trustee for Indians, does not act as an insurer of trust property. In order to establish a breach of trust, petitioners would be required to prove that the responsible Interior Department officials failed to exercise the care and skill that a person of ordinary prudence would exercise in dealing with his own property. *United States* v. *Mason*, 412 U.S. 391, 398 (1973). In the present context, that would requiring a showing, inter alia, that the alleged determination in 1922 that the United States' trust responsibility with respect to Lot 1 had terminated (see note 2, *supra*) was unreasonable.

[5] Petitioners err in relying (Pet. 12-13) on *Fehl* v. *United States*, 59 Ct. Cl. 682, 683 (1924), and *Bayshore Resources Co.* v. *United States*, 2 Cl. Ct. 625, 636 (1983), for the proposition that the statute of limitations did not run in this case because

In both *Crown Coat Front Co.* v. *United States*, 386 U.S. 503 (1967), and *Nager Electric Co., Inc.* v. *United States*, 368 F.2d 847 at 855-857 (Ct. Cl. 1966), relied upon by petitioners (Pet. 13), the statute of limitations was held not to run while *administrative* proceedings were ongoing. But in those cases, the final administrative decision was subject to judicial review in the relevant judicial proceedings, and principles of exhaustion of administrative remedies therefore supported the conclusion that the statute of limitations did not begin to run until that final decision was rendered. But "[i]t is only when pursuance of administrative remedies is a prerequisite to suit that the statute of limitations is suspended or tolled by such pursuance." *Steel Improvement & Forge Co.* v. *United States*, 355 F.2d 627, 631 (Ct. Cl. 1966) (citation omitted). See also *Hannon* v. *United States*, 3 Cl. Ct. 89 (1983), aff'd, 732 F.2d 168 (Fed. Cir. 1984); *Sharp* v. *United*

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they were first required to establish valid title to the property in the *Brooks* litigation. In *Fehl*, the court in fact dismissed the claim for just compensation because the petition alleged facts showing that the statute of limitations had run (59 Ct. Cl. at 683). The court further implied that the complaint also was defective because it did not allege who was the owner of the property prior to the tax sale (*ibid.*), although the court did not suggest that it would have been necessary to decide that question in separate litigation in district court, as petitioners maintain here. In *Bayshore Resources*, the court likewise found the suit to be time-barred (2 Cl. Ct. at 632-633). The court held in the alternative that in order to recover, the plaintiffs must show that they "held valid unpatented mining claims" (*id.* at 636). However, that precise issue had been decided adversely to the plaintiffs in other litigation and relitigation was barred by res judicata (*ibid.*). Once again, the court did not suggest that other litigation was a condition precedent to the Tucker Act suit.

States, 207 Ct. Cl. 975, 976-977 (1975); *Reynolds Metal Co.* v. *United States*, 438 F.2d 983, 985 (Ct. Cl.), cert. denied, 404 U.S. 825 (1971). A fortiori, where, as here, no administrative proceedings are involved, the statute of limitations was not tolled. The exhaustion principles found significant in *Crown Coat* and *Nager* are inapplicable in the context of parallel judicial proceedings, and the final judgment entered by the district court in *Brooks* was not subject to judicial review by the Claims Court in this Tucker Act suit.

b. Petitioners also err in arguing (Pet. 15-17) that the statute of limitations was not triggered because of the existence of a trust relationship between the United States and petitioners. In *United States* v. *Mottaz*, No. 85-546 (June 11, 1986), the Court found that the 12-year statute of limitations under the Quiet Title Act (QTA), 28 U.S.C. 2409a(f), barred an action against the United States by a Chippewa Indian based on an allegedly wrongful alienation of her property by the United States. In so doing, the Court explicitly held that although federal law provides Indians with a range of special protections, waivers of sovereign immunity may not be lightly implied even in favor of Indians. Accordingly, the Court held that the statute of limitations in 28 U.S.C. 2409a(f), which applies to "[a]ny civil action" under the QTA, is fully applicable to suits by Indians. Slip op. 8-9, 16-17.

These same principles apply to suits in the Claims Court. Under 28 U.S.C. 2501, "[*e*]*very* claim of which the United States Claims Court has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first occurs" (emphasis added). This all-encompassing language

clearly applies to suits by Indians. It also is significant that the third paragraph of 28 U.S.C. 2501 provides an explicit exception for situations in which the plaintiff is "under legal disability or beyond the seas at the time the claim accrues." Congress's inclusion of this express exception reinforces the conclusion that no other exceptions were intended. See *Soriano* v. *United States*, 352 U.S. at 272-274; *Kendall* v. *United States*, 107 U.S. 123, 125 (1882). There is no suggestion in this case that either Rogers or petitioners were under a legal disability that would have prevented them from resorting to the courts immediately after 1937. See, *e.g.*, *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 368-369 (1968).

Moreover, petitioners' argument (Pet. 16-17) that the trust relationship between Indians and the federal government renders statutes of limitations inapplicable has been consistently rejected by the Federal Circuit. See, *e.g.*, *Menominee Tribe* v. *United States*, 726 F.2d 718 (Fed. Cir. 1984); *Hydaburg Co-Op. Ass'n* v. *United States*, 667 F.2d 64, 69-70 (Ct. Cl. 1981), cert. denied, 459 U.S. 905 (1982); *Pitt River Tribe* v. *United States*, 485 F.2d 660, 664 (Ct. Cl. 1973), cert. denied, 419 U.S. 831 (1974); *Capoeman* v. *United States*, 440 F.2d 1002 (Ct. Cl. 1971); *Mitchell* v. *United States*, 10 Cl. Ct. 63, 67-69 (1986). Nor has any other court of appeals recognized an Indian exception to statutes of limitations. See *Loring* v. *United States*, 610 F.2d 649, 650 (9th Cir. 1979); *Christensen* v. *United States*, 755 F.2d 705, 706-707 (9th Cir. 1985), cert. denied, No. 85-372 (June 16, 1986).

Petitioners assert (Pet. 16), however, that under a "universal rule," the statute of limitations does not run against a beneficiary in favor of a trustee

until the trust is repudiated. Petitioners rely (Pet. 16) on *United States* v. *Taylor*, 104 U.S. 216 (1881); *Wayne* v. *United States*, 26 Ct. Cl. 274 (1891); and *Russell* v. *United States*, 37 Ct. Cl. 113 (1902). However, as the Court of Claims observed in *Capoeman* v. *United States*, 440 F.2d 1002, 1003 (Ct. Cl. 1971), those cases "all involved liquidated claims for which money had been appropriated and the validity of which was uncontested." In such a situation, the United States holds the funds in question for the beneficiary and is under a continuing duty to make them available upon demand. As a result, the beneficiary is under no obligation to make such a demand within any particular period of time. *United States* v. *Taylor*, 104 U.S. at 221-222. However, the statute of limitations *would* begin to run in such a situation if the beneficiary made a demand that the money be paid or used for his benefit and the responsible government official declined to do so. *Id.* at 222; *Wayne* v. *United States*, 26 Ct. Cl. at 289; *Russell* v. *United States*, 37 Ct. Cl. at 118. That result would be but a particular application of the established rule that where property is held under an "express trust," the statute of limitations begins to run when the trustee repudiates that trust. *United States* v. *Taylor*, 104 U.S. at 222; *Papasan* v. *Allain*, No. 85-499 (July 1, 1986), slip op. 13 n.12.

In this case, petitioners do not seek to recover a liquidated sum of money already appropriated and held for their benefit, where the government does not contest the validity of their claim. Rather, they seek damages for a past breach of fiduciary duty in circumstances in which the United States does not concede that it had a duty to act. Moreover, there plainly was a repudiation of the trust relationship

by virtue of the United States' acquiescence in the tax sale in 1937 and for many years thereafter. As the court of appeals observed, "[a] trustee may repudiate an express trust by words, or, as in this case, by actions inconsistent with his obligations under the trust" (Pet. App. 5). In this respect, the instant case is again like *Mottaz*. There, the property allegedly was improperly conveyed by the United States out of a trust status that the plaintiff contended was still in existence, but the Court nevertheless held that the suit was barred by the statute of limitations.[6]

3. Finally, and contrary to petitioners' contention (Pet. 13-15), petitioners have not stated a cause of action for indemnity. The rule as to indemnity is that "[a] person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity from the other, unless the payor is barred by the wrongful

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[6] Petitioners' discussion (Pet. 15-16) of *Ewert* v. *Bluejacket*, 259 U.S. 129 (1922), which involved an action to recover land or its monetary equivalent, is irrelevant. This action is one for damages arising from governmental inaction; it is not an action for money damages in lieu of land. The property itself was returned to petitioners in the *Brooks* litigation. In any event, petitioners err in contending that *Ewert* v. *Bluejacket* stands for the proposition that a federal statute of limitations never begins to run if the underlying transaction is void. *Ewert* held only that a *state* statute of limitations did not bar a suit brought by an Indian to recover land that had been sold in violation of a federal statutory restriction. As this Court made clear in *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 240 n.13 (1985), the holding in *Ewert* rested on the principle that under the Supremacy Clause, state-law time bars do not apply of their own force to Indian land title claims.

nature of his conduct." Restatement of Restitution and Unjust Enrichment § 76 (Proposed Final Draft 1936). The *Brooks* litigation, however, did not determine a duty or liability owed *by* petitioners that should have been discharged by the United States; rather, it determined the liability of Nez Perce County *to* petitioners. Petitioners accordingly have paid no judgment for which they might claim a right to be indemnified. Indeed, the principle governing the amount recoverable in an indemnification action compels the conclusion that no action for indemnification lies here. Reimbursement is "limited (a) to the amount of [one's] net outlay properly expended * * * and (b) if the payor became a party to the transaction without the consent or fault of the other, to the amount by which the other has thereby benefited." Restatement of Restitution and Unjust Enrichment § 580 (Proposed Final Draft 1936). Petitioners have made no "net outlay," and the United States has not benefited from any expenditure by petitioners.

Consequently, petitioners' reliance (Pet. 15) on an indemnity theory in support of the argument that their cause of action did not accrue until 1983, when the judgment in *Brooks* awarded less than the claimed aggregate fair market rental value, is without foundation. In indemnity or contribution actions such as *Keleket X-Ray Corp.* v. *United States*, 275 F.2d 167 (D.C. Cir. 1960), and *Central Rivers Towing, Inc.* v. *City of Beardstown*, 750 F.2d 565 (7th Cir. 1984), cited by petitioners (Pet. 14), the cause of action does not ordinarily accrue until the indemnitee's liability to a third party is fixed, since no "loss" is suffered before then. See *ITT Rayonier, Inc.* v. *Southeastern Maritime Co.*, 620 F.2d 512, 514 (5th Cir. 1980); *Austin* v. *North America Forest*

Products, 656 F.2d 1076, 1086 (5th Cir. 1981). Here, by contrast, the "loss" to Rogers and her successors in interest occurred in 1937, when the property was sold; it did not stem from the judgment in the *Brooks* litigation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

PATRICIA L. WEISS
DAVID C. SHILTON
M. ALICE THURSTON
Attorneys

MARCH 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40275